

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANTS

IN THE United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1945

No. 9102

357

JOHN AGNEW, F. O. FAYERWEATHER, *Appellants,*

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN K. MCKEE, ERNEST G. DRAPER, RUDOLPH M. EVANS, *Appellees.* _____

Appeal from the District Court of the United States for the District of Columbia.

FRANK J. DAVIES,

*Paterson National Bank
Bldg.,*

Paterson, New Jersey;

HUGH H. OBEAR,

*Southern Building,
Washington, D. C.,*

Attorneys for Appellants.

DAVIES & DAVIES,

DOUGLAS, OBEAR & CAMPBELL,

Of Counsel.

*United States Court of Appeals
for the District of Columbia*

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Joseph W. Stewart
CLERK

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vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN K. MCKEE, ERNEST G. DRAPER, AND
RUDOLPH M. EVANS, *Appellees*

Appeal from the District Court of the United States for the
District of Columbia.

BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

This appeal is from a final judgment of the District Court of the United States for the District of Columbia

(R. 26) dismissing an action brought by appellants against the Board of Governors of the Federal Reserve System, Washington, D. C. (hereinafter called the "Board") and against the individually named appellees, who are the members thereof (hereinafter sometimes called the "Members" or the "individual defendants").

Appellants complaint (R. 2) presented the question of the power of the Board to remove from office the two appellants who were directors of the Paterson National Bank of Paterson, New Jersey.

The complaint was in the nature of a petition for writ of certiorari. Upon filing the complaint appellants also filed a motion in the nature of a rule upon the Board to show cause why the whole record of the proceedings before it and its order should not be sent up to the end that the District Court review the same to determine whether the Board had acted within its jurisdiction.

The Board responded with a motion to dismiss (R. 22) upon the grounds that:

(a) The District Court is without jurisdiction to entertain a suit against the Board of Governors of the Federal Reserve System, which is an instrumentality of the United States, and which has not consented nor can it consent to be sued herein.

(b) The District Court is without jurisdiction to issue a writ of certiorari for the purpose outlined in the bill of complaint herein.

(c) The complaint fails to state a claim upon which any relief can be granted.

Thereupon appellants, taking advantage of the benevolent Rules of Civil Procedure, amended their complaint (R. 23) to include the individual members of the Board, and to add a prayer in the alternative for a mandatory injunction against them and for general relief. *Rules of Civil*

Procedure—Rule 8(e)(f).

A stipulation (R. —) was then entered into between counsel to the following effect:

- (a) Appellants might file an amended complaint;
- (b) Counsel for the Board would enter an appearance for the added individual defendants;
- (c) The motions theretofore filed by appellants and by the Board upon the original complaint should stand as motions to the amended complaint save and except that the defendants might file such other and further motions as they may be advised;
- (d) The stipulation theretofore filed in respect of the original complaint should stand as a stipulation to the amended complaint.

Thereupon the individual defendants filed a motion to dismiss (R. 25) the amended complaint upon substantially the same grounds as that theretofore filed by the Board.

So there were three motions before the District Court: (1) appellants' motion for a writ; (2) the Board's motion to dismiss, and (3) the Members' motion to dismiss. All three motions were considered in one argument.

The complaint and the amended complaint were dismissed on the 25th day of June, 1945 (R. 26).

The civil action was within the jurisdiction of the District Court. That court has power to

“* * * issue writs * * * of certiorari, injunctions prohibitory and mandatory and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction.”
D. C. Code (1940) Title 11, § 315.

Hartranft v. MULLOWNEY, 247 U. S. 295 (1918). This power has not been repealed or modified by the Rules of Civil Procedure *Cf. Rule 81 (b)*.

This Court has jurisdiction upon appeal to review the judgment in question by virtue of the provisions of the *District of Columbia Code* (1940) Title 17 § 101.

STATEMENT OF THE CASE

On March 23, 1945, the Board issued an order removing appellants as directors of The Paterson National Bank, Paterson, New Jersey. The order was issued pursuant to authority conferred upon the Board by section 30 of the Banking Act of 1933 (12 U. S. C. A. § 77) ¹ which provides, inter alia, that if, following a hearing, the Board finds that an officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller of the Currency (hereinafter called the "Comptroller") to discontinue such violation, the Board in its discretion may order that such officer or director be removed from office. The finding upon which the order was made was that appellants had continued to violate section 32 of the Banking Act of 1933 (12 U. S. C. A. § 78) ² after having been warned by the Comptroller to discontinue such violation.

Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the issue, flotation, underwriting, public sale or distribution of stocks, bonds or other securities, from serving at the same time as an officer, director or employee of any national bank.

Fortunately there are no disputed questions of fact so that the questions to be presented are those of "pure law."

Appellants were and are employees of Eastman, Dillon & Co., a brokerage and securities house, having its principal

¹ The provisions of this section are set out in full in "Statutes Involved"—post.

² This section is also set out in full in "Statutes Involved"—post.

place of business in New York City. This firm, it was charged, was "*primarily engaged*" in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds or other similar securities * * *."

It is not contended by the appellees or anyone else that the appellant directors had not performed their duties faithfully, nor could it have been. It is not contended that they have been guilty of any act which caused loss to the bank or its stockholders. It is not contended that they have used their position as directors for any ulterior or selfish purposes. Their removal revolves around the purely technical question of whether they were employees of a partnership "*primarily engaged*" in the "issue, flotation, underwriting, public sale or distribution of stocks, bonds or similar securities".

It was not charged that the appellants actually sold any stocks or bonds to the bank unlawfully or otherwise.³

The Board on August 9, 1944, issued an order notifying appellants to appear and to show cause why they should not be removed from office as directors of the bank. A Hearing Officer was appointed by the Board, and thereafter hearings were conducted by such officer at the Federal Reserve Bank of New York during October and December, 1944. Appellants were represented in these hearings by counsel and were present at most of the hearings.

Thereafter on February 15, 1945, the Hearing Officer certified to the Board the transcript of the proceedings conducted before him, together with his recommended findings of fact. He also forwarded certain suggested corrections to

³ Even had they sold stocks and bonds to the bank the propriety of this action could not be questioned in view of the provisions of Section 375, Title 12, which gives an express right to directors to buy and sell from and to their respective banks.

the record, exceptions to his tentative findings, certain motions, and a brief, all filed with him on behalf of the appellant.

On March 12, 1945, appellants, with their counsel, appeared in person before the Board in Washington, D. C., and their counsel argued the matter orally before the Board.

The Board thereupon rendered its opinion (annexed as exhibit B to the complaint) (R. 10) wherein it stated: That there was no dispute as to the essential facts; that appellant Fayerweather had been a director of the bank since January 13, 1925, while appellant Agnew had been a director since November 27, 1934; that both appellants were elected directors at annual meetings of the shareholders of the bank held on January 13, 1942, January 12, 1943 and January 11, 1944, and that following these elections they took the appropriate director's oaths which were filed in the office of the Comptroller of the Currency.

The opinion and findings further showed that the total holdings of stock of the bank by the appellants and their families to be approximately 1000 out of the total of 12,000 shares; that Mr. Fayerweather had been in the brokerage and securities business since about 1920, and that both he and Mr. Agnew had been employed by the firm of Eastman, Dillon & Co. since March, 1941, and were then employed at the office of that company in Paterson, New Jersey; that Eastman, Dillon & Co. did no business with the bank and had not done any since the fall of 1941 when the bank disposed of all of its bonds other than United States government bonds; that Eastman, Dillon & Co. does not deal in United States government bonds; and that since October, 1941, appellants have done no business with the bank other than a strictly brokerage commission business with its customers.

The Board found that Eastman, Dillon & Co. (which is a partnership) acts as a broker or principal in executing orders on the New York Stock Exchange, Curb Exchange and the Philadelphia Exchange; it buys and sells securities either as broker or as principal, at wholesale or retail. Its business is done on fiscal year basis. In the underwriting field, as distinguished from the brokerage field, the *market value* of securities which were bought and sold by Eastman, Dillon & Co. amounted to about 15 per cent of the total market value of its entire transactions in all activities. For the fiscal year ended February 28, 1943, its *gross income* from its underwriting business amounted to 26 per cent of its gross income from all sources, while its gross income from its brokerage business amounted to 42 per cent of its gross income. For the fiscal year ended February 29, 1944, its gross income from its underwriting business amounted to 32 per cent of all of its income while its gross income from its brokerage business amounted to 47 per cent of that total. In *total numbers* of transactions during an indefinite period prior to September 20, 1943, those in the underwriting field would amount to a similar 15 per cent of the total. In *no* category did the underwriting field *ever* exceed the brokerage field.

STATUTES INVOLVED

Section 30 of the Banking Act of 1933—As amended June 16, 1933, C. 89, § 30, 48 Stat. 193; Aug. 23, 1935, C. 614, § 203a, 49 Stat. 704:

“Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company

or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the court."

(U. S. Code, Title 12, §77.)

Section 32 of the Banking Act of 1933; June 16, 1933, C. 89, § 32, 48 Stat. 194 (as amended Aug. 23, 1935, C. 614, § 307, 49 Stat. 709).

“No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.” (U. S. Code, Title 12, Sec. 78.)

STATEMENT OF POINTS

The points to be urged here are that:

(1) The Board of Governors of the Federal Reserve System exceeded its authority or acted in disregard of the applicable statutory provision in removing appellants as directors.

(2) The District Court should have granted appellants relief.

(3) This is not a suit against the United States.

(4) If the construction of the statute is not that placed thereon by appellants then the Act (Sec. 32 of the Banking Act) constitutes an unlawful delegation of authority and is therefore void.

(5) The District Court should not have dismissed appellants' complaint.

SUMMARY OF ARGUMENT

(1) The Board's own findings with respect to the activities of Eastman, Dillon & Co. show beyond peradventure that the underwriting part of its business was not that in which it was "primarily engaged"—that its business in the stock brokerage field exceeded that of its business in the underwriting field. In no category of the underwriting field, whether in gross income, market value of securities handled, or in the total number of transactions did its underwriting business ever exceed that in the brokerage field. Accordingly we say that the Board could not find under the language of the statute that Eastman, Dillon & Co. was "primarily engaged" in the underwriting business. Its effort to do so is by the addition to the words "primarily engaged" in the Statute of the words "one of the primary activities" and this, under the law, it may not do, whether the Statute be penal or non-penal.

Addison v. Hollyhill Fruit Products, 322 U. S. 607.

We further contend that the Statute is penal making all the more clear the fact that the Board's power under the Statute did not extend to such a case as its own finding shows this to have been. (See the penal sanction of § 30.)

(2) We contend that the remedy, if it be not by injunction against the individual members of the Board, is by the common law writ of certiorari and to that effect cite *Degge v. Hitchcock*, 229 U. S. 162 to show that the Supreme Court has left open the door of applicability of that writ in an appropriate case.

(3) We maintain that under the doctrine of *Philadelphia v. Stimson*, 223 U. S. 605, and other cases cited this is not a suit against the United States.

(4) We maintain that if the words "primarily engaged" are not to be measured by the extent of the business (i.e. in

a quantitative sense) then the Statute is void as constituting an unlawful delegation of authority to the Board. There would be no standard or yardstick to govern its action.

We rely upon *Panama Refining Company v. Ryan*, 293 U. S. 388, and other cases cited for this contention.

ARGUMENT

I

Did the Board exceed the authority conferred or act in disregard of the statutory provision?

The answer to the question depends upon the proper interpretation of the Statute to see *what power* Congress conferred on the Board. Manifestly the power to remove directors was given *only* if certain circumstances were present i.e. that the directors were "primarily engaged" or employees of a firm "primarily engaged" in the underwriting and sale of securities.

A

What then does the statute mean when it prohibits one from acting as a director, who is, at the same time, an employee of a partnership "*primarily engaged*" in the underwriting and sale of securities:

The statute—as we will show later in the brief—is a penal statute and to be construed according to the canons of construction applicable to penal statutes—but even if it were not it still would not satisfy the rule laid down by the Supreme Court of the United States for the construction of *non-penal* statutes. That rule is:

"Words in a statute are to be given their ordinary meaning."

As said by Mr. Justice Frankfurter, speaking for the Supreme Court of the United States in *Addison v. Hollyhill Fruit Products*, 322 U. S. 607; 88 L. ed. 1488, 1506 (1944):

“* * * after all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.”

When so construed, it is clear that the meaning sought to be attributed by the Board to the words “primarily engaged” cannot be sustained. To the man in the street “primary” means of course “in the first place.” The word “primary” has only *one* legal definition. In Bouvier’s Law Dictionary it is defined as “that which is first or principal”; in Black’s Law Dictionary, “first,” “chief,” “principal,” “leading;” in Rapalje & Lawrence’s Law Dictionary “first,” “chief,” “leading.”

The very first definition of the word “primary” in Webster’s International is “in the first place.” “Primarily” is of course used in contradistinction to secondarily, tertiarily, etc. One is primarily engaged in one business, secondarily engaged in another. There cannot be two “firsts.” One can say “I read the first two pages of a book,” but one cannot say “I read the two first pages.”

“Primary” is derived from the Latin “Primus” meaning first. Numerous words derived from the root “primus” mean essentially first in their respective class, such as

Primate—meaning first minister (a cleric).

Prime Minister—first minister (civic head).

Primer—first reader.

Primogeniture—first son.

Prince—first in line.

The reference in the Board’s opinion to “one of the primary colors,” “one of the primary planets” is of course correct usage, but the law with which we are here confronted *does not say* “one of the primary activities, etc.” In order to sustain the Board’s view it is necessary to

write into the statute the words "one of the primary activities". This is precisely what the Board attempts to do, and precisely what the Board is not empowered to do.

By applying the above definition of "primarily engaged" or "primary" obtained from the authoritative sources indicated to the facts found by the Board it is obvious that the first or primary business of Eastman, Dillon & Co. is a brokerage business and not the business of underwriting securities. This is a plain and inescapable conclusion. None other is possible.

B

Penal Statute

When to the foregoing there is added, for the purpose of construction, the consideration that the statute in this case is *penal* and therefore one which must be strictly construed, it is impossible to sustain the Board's action. As said by the Supreme Court of the United States in *Todd v. United States*, 158 U. S. 278 (1895), 39 L. ed. 982:

"Before a man can be punished his case must be plainly within the statute."

From *United States v. Wiltberger*, 5 Wheat. 77, 95, 5 L. ed. 37 (opinion by Chief Justice Marshall) to *United States v. Viereck*, 318 U. S. 326, 87 L. ed. 734 (opinion by Chief Justice Stone), the Supreme Court has steadfastly declined to extend by implication any penal statute.

The Viereck case in and of itself is all the authority that one should need to show that the Board cannot add to the statute the phrase "one of the primary businesses" so as to subject the appellants to the imposition of criminal sanction. Since the Viereck case arose recently in the District of Columbia and was considered by this Court it is unquestionably familiar with the circumstances. Viereck had

been indicted for failure to disclose his activities on his own behalf on a registration statement prepared by the State Department under the statute requiring the registration of certain agents of foreign principals. Act of June 9, 1938, 52 Stat. 631; sec. 327 as amended by Act of August 7, 1939, 53 Stat. 1244; Title 12, Secs. 521-522 USCA.

The statute authorized the Secretary of State to prescribe the form upon which an agent should so report to set forth:

“A statement containing such details required under this act as the Secretary shall fix of the activities of such person as an agent of a foreign principal during said six months period.”

On the trial Viereck contended that under the statute he was not required to disclose *his activities in his own behalf* but only those for foreign principals. He was found guilty by the District Court, his conviction affirmed by this Court, but the Supreme Court reversed on the ground that the Secretary had placed too broad an interpretation upon the language of the statute and had attempted to write into it something which was not there. Chief Justice Stone said:

“One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute or by regulation having legislative authority, and then only if punishment is authorized by Congress. *United States v. George*, 228 US 14, 20-22, 57 L. ed 712, 715, 716, 33 S. Ct. 412; *Williamson v. United States*, 207 US 425, 453-462, 52 L. ed 278, 292-297, 28 S. Ct. 163; *United States v. Standard Brewery*, 251 US 210, 219, 220, 64 L. ed 229, 235, 236, 40 S. Ct. 139; *United States v. Eaton*, 144 US 677, 36 L. ed 591, 12 S. Ct. 764; *United States v. Grimaud*, 220 US 506, 55 L. ed 563, 31 S. Ct. 480; *United States v. Smull*, 236 US 405, 59 L. ed 641, 35 S. Ct. 349; *Re Kollock*, 165 US 526, 41 L. ed 813, 17 S. Ct. 444. Penal

sanctions attach here for willful failure to file a statement when required, or if the registrant 'wilfully omits to state any material fact required to be stated.' Unless the statute, fairly read, demands the disclosure of the information which petitioner failed to give, he cannot be subjected to the statutory penalties.

* * *

* * * In neither case does the statute command, or authorize the Secretary to command registrants to make any statements of their activities other than those in which they have engaged 'as agent'.

We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent'. The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem.

* * *

* * * While Congress undoubtedly had a general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose."

In *Fasulo v. United States*, 272 U. S. 620; 721 L. ed. 443, the statute under consideration was the postal statute against schemes to defraud. Fasulo had been indicted for having threatened murder or bodily harm, the government's contention being that this amounted to a scheme to defraud when such threats were used for the purpose of obtaining money. The Supreme Court said, however:

"* * * But broad as are the words 'to defraud' they do not include threat and coercion through fear or force."

The concluding language of the Fasulo case (it is a quotation from *United States v. Chase*, 135 U. S. 255, 34 L. ed. 117) is specially apposite to the appellants' contention:

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

In *United States v. Resnick*, 299 U. S. 207, 81 L. ed. 127, the defendants in a criminal indictment were accused of having sold two-quart metal hampers which did not comply with the Act in that they were not of any standard size, etc. The Act declared "that standard hampers * * * shall be of the following capacities (specifying 9 sizes based upon a bushel of 2150.42 cubic inches). The Court said:

"Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42. *Fasulo v. United States*, 272 U. S. 620, 628, 71 L. ed 443, 445, 47 S. Ct. 200. The clause just quoted is crucial; its words are plain and, having regard to the connection in which they are used, must be given the meaning naturally attributable to them. It is obvious that they do not extend to hampers other than the nine classes defined in § 1. The Act applies to none of capacity less than four quarts. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 183, 80 L. ed 138, 144, 56 S. Ct. 159, 101 A. L. R. 853. It expressed no condemnation of two-quart hampers. Before one may be punished it must appear that his case is plainly within the statute; there

are no constructive offenses. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. ed 1080, 1083, 10 S. Ct. 625; *United States v. Chase*, 135 U. S. 255, 261, 34 L. ed 117, 119, 10 S. Ct. 756; *Fasulo v. United States*, supra (272 U. S. 629, 71 L. ed 445, 47 S. Ct. 200). As in absence of governmental regulation the making and selling of containers is untrammelled, failure expressly to permit is not to prohibit. Mere standardization of a bushel container at 2150.42 cubic inches would not make criminal the manufacture or sale of a half-bushel container having capacity of 1075.21 cubic inches. The prescribing of capacities of containers described in § 1 does not prohibit manufacture or sale of the two-quart hampers described in these indictments."

In *Pierce v. United States*, 214 U. S. 306, 86 L. ed. 227, the defendant had been convicted under § 32 of the Criminal Code, making it an offense falsely to assume or pretend, with intent to defraud, to be an officer or employee acting under the authority of the United States or any department, or any officer of the government thereof. Defendant had falsely impersonated an official of a government owned corporation (the Tennessee Valley Authority). The Supreme Court, in reversing the conviction, said:

"While the act should be interpreted 'so as * * * to give full effect to its plain terms' (citing *Lamar v. United States*, 241 U. S. 103, *U. S. v. Barnow*, 239 U. S. 74) we should not depart from its words and context."

In *Krichman v. United States*, 256 U. S. 363, defendant was convicted of offering a bribe to a baggage porter while the railroad was under Federal control. The Supreme Court in reversing the conviction, said:

"The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We

are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government."

United States v. Harris, 177 U. S. 305, 44 L. ed 780, was an action to recover penalties for alleged violation of law relating to transportation of live stock. The question involved was whether the defendants who were in charge of the Reading Railroad, as receivers were liable. The Supreme Court in sustaining the decision of the lower court in favor of the defendant receivers said:

"It may well be that Congress, in omitting to expressly include receivers in these sections intended to leave them subject to the control and direction of the courts, who-- officers they are."

and quoted the language of Chief Justice Marshall in *United States v. Wiltberger*, *supra*:

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes * * * But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation or in that

sense in which the legislature has obviously used them would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.”

The foregoing cases clearly demonstrate that there is no justification for the Board to have interpreted the Statute as meaning:

“* * * *one of the primary activities, etc.*”

and that its power to act must be confined to cases in which the employees sought to be removed are those of a firm “primarily engaged” in underwriting.

The penal sanctions of the act as respects these appellants is contained in § 30 which provides:

“* * * Any such director * * * removed from office * * * who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the court.”

II

The Remedy

If appellants are right in the interpretation to be given Section 32 of the Banking Act of 1933, as amended, we are then brought to the question of what is the appropriate remedy or whether there is none.

A

Certiorari

The District Court has power to "issue writs of * * * certiorari, injunction prohibitory and mandatory—and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction." *D. C. Code* (1929), Title 11, § 315; *Hartranft v. Mullenney*, 247 U. S. 295 (1918). This power has not been repealed or modified by the Rules of Civil Procedure. *Cf. Rule 81 (b)*.

This Court and the Supreme Court of the United States have frequently said that the writ of certiorari lies to inferior courts and boards, officers and special tribunals exercising judicial or *quasi-judicial* functions to bring their proceedings into court where they may be reviewed and quashed if it be shown that such board or tribunal has no jurisdiction or has exceeded its jurisdictions or had deprived a party of a right or imposed a burden upon him or his property without due process of law.

Degge v. Hitchcock, 229 U. S. 162; 57 L. ed. 1135 (1913), is the leading case on the subject. Unquestionably the *Degge* case denies the right to the writ where it is sought merely to "review" an administrative order. But in a case where it is claimed that there has been (a) "arbitrary exercise of statutory power" or (b) a "ruling in excess of statutory power" and there is no relief to be granted other-

wise it would seem that the writ is appropriate. A careful reading of the opinion shows that the writ could be availed of only in the event that there was no right to "apply for and *obtain* appropriate relief in equity." The court says:

"Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620.

"*The fact that there was this remedy* is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice."

Certainly the opinion does not close the door on the applicability of the writ in an appropriate case for the Court concludes the opinion by saying:

"The writ of certiorari is one of the extraordinary remedies and being such it is impossible to anticipate what exceptional facts may arise to call for its use, but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. *Public Clearing House v. Coyne*, 194 U. S. 497. This cannot be done."

In the Degge case the Supreme Court said that the writ was only where the "inferior tribunal has acted without jurisdiction, or in disregard of statutory provisions"; and that in "those cases the writ ran to boards, officers, tribunals and inferior judicatures whose findings and decisions, even though erroneous, have the quality of a final judgment; and there being no right of appeal or other method of review,

the extraordinary writ of certiorari *was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice.*"

The opinion and order of the Board on removing the appellants as directors was in a *quasi-judicial* proceeding.

In the first place it is to be observed that Sections 30 and 32 of Title 12 of the United States Code are not contained in the portion of the banking laws relating to the "Federal Reserve System" (see § 221-352, inc.) but in that portion relating to "National Banks" (see § 21-213, inc.) historically and now under the supervision of the Comptroller of the Currency (under the "*general supervision*" of the Board—and under the "*general directions*" of the Secretary of the Treasury).

Cooper v. O'Connor (1938), 69 App. D. C. 100, 99 F. (2d) 135, followed in *Cooper v. O'Connor*, 69 App. D. C. 108, 99 F. (2d) 143, Cert. denied 305 U. S. 642.

In the next place the proceeding here provided for and followed (Sec. 30) was that the Comptroller, being of the opinion that the appellants (directors of a national bank) had continued to violate a law relating to a national bank after having been warned by the Comptroller to discontinue such violation, certified the facts to the Board. Whereupon the Board proceeded as a *quasi-judicial* tribunal to a trial by (a) causing a notice or rule to show cause to be issued and served upon the appellants why they should not be removed from office; (b) appointing a "hearing officer" to "receive testimony" and to report the same completely to the Board, including therewith any "statements, motions, exceptions, arguments and briefs", etc.—initiate, conduct or participate in prehearing proceedings followed by tentative findings of fact, and followed by an opinion of the Board containing findings of fact and *conclusions of law*.

It is thus seen that the Board possesses "judicial" as well as "administrative" functions. In most of its duties it is unquestionably acting in an administrative capacity—but it can hardly be contended that here it was not acting in a *quasi-judicial* capacity. It is the character of the act to be reviewed which determines whether certiorari will issue or not.

Certiorari will lie if the action of the Board is (a) *beyond its power*, (b) *final*, and (c) *not reviewable otherwise*. The foregoing circumstances *concurring*, the issuance of the writ would seem to be authorized under the authority of *Degge v. Hitchcock*, *supra*, unless, as the Court said in that case, "appropriate relief" may be granted "in a court of equity".

B

Injunction

If certiorari does not lie it is only because an injunction against the members of the Board individually furnishes the remedy.

So far as plaintiffs are concerned *the form* of the remedy is immaterial, it is the redress of a grievous and unwonted wrong which they seek.

There can be no question but that plaintiffs have suffered and will continue to suffer irreparable injury from the Board's action and that unless the relief be by certiorari there is no adequate relief other than by injunction.

Ex Parte Young (1907), 209 U. S. 123, 159; 52 L. ed. 714, 729.

Terrace v. Thompson, 263 U. S. 197 (1923).

Pierce v. Society of Sisters, 268 U. S. 510; 69 L. ed. 1070 (1925).

Panama Refining Company v. Ryan, 293 U. S. 388 (1935).

III

This Is Not a Suit Against the United States

United States v. Lee (1882), 106 U. S. 196; 27 L. ed. 171.

Ex Parte Young, supra.

Philadelphia v. Stimson, 223 U. S. 605 (1912).

O'Connor v. Rhodes (1935), 65 App. D. C. 21, 27; 79 F. (2d) 146.

In *Philadelphia v. Stimson, supra*, the Court said:

“It is urged that the statute authorizing the Secretary of War to prevent encroachments upon navigable streams is a valid one, and that the decisions cited do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing, in the name of the state, unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex Parte Young*, 209 U. S. p. 159, 52 L. ed. 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; 14 A. & E. Ann. Cas. 764. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property.”

And in *O'Connor v. Rhodes*, 65 App. D. C. 21, 27:

“* * * Resort to equity * * * is not to be defeated upon the ground that the suit is one against the United States.”

As the Court observed in *Noble v. Union River Logging R. R.*, 147 U. S. 172:

“If he (Secretary of Interior) has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus, if he refused to do an act which the law plainly required him to do.”

To same effect:

Payne v. Central Pac. R. R., 255 U. S. at 238.

Work v. Louisiana, 269 U. S. 250.

Goltra v. Weeks, 271 U. S. 536.

In *Ickes v. Fox*, 66 App. D. C. 128, 131, 85 Fed. (2d) 294, 297, (1936), this Court said:

“We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of Interior from enforcing the alleged illegal orders issued by that officer and his predecessor in office in his capacity as the administrative agent of the government for the construction of irrigation works and the disposition of the same under the Reclamation Act. The suit is therefore one against an agent of the government and not against the government.”

As did the Supreme Court of the United States in *Ickes v. Fox*, 300 U. S. 82 (at p. 97) (1936):

“The complainant did not ask the Court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.”

IV

Unlawful Delegation

If the words "primarily engaged" do not mean "*first*" in a quantitative sense, as contended by appellants, the act constitutes an unlawful delegation of authority in that it furnishes no intelligible principle upon which the Board may act. There are no standards—there is no yardstick.

Panama Refining Co. v. Ryan (1934) 293 U. S. 388, 421.

As Mr. Justice Roberts said in his separate opinion in the *Hollyhill* case (*supra*):

"If Congress, when it said that the areas of production should be defined by the Administrator, meant that the official should have a roving commission to create exemptions from the act, the entire provision must fall as an unconstitutional attempt to delegate legislative power."

There is no constitutional power in the Congress for the delegation in a criminal statute of authority to an administrative officer to fix a standard, the violation of which shall constitute a crime. The standard must be fixed in the statute itself.

United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 S. Ct. 412.

United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. Ct. 269.

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. ed. 888, 59 S. Ct. 618.

United States v. Chase, 135 U. S. 255, 34 L. ed. 117, 10 S. Ct. 756.

Conclusion

It is respectfully submitted that the Board of Governors of the Federal Reserve System exceeded its authority when it concluded as a matter of law that the statute in this case afforded it power to remove appellants from the office of directors of the Paterson National Bank under the circumstances shown in its own findings of fact.

Respectfully submitted,

FRANK J. DAVIES,

HUGH H. OBEAR,

Attorneys for Plaintiffs.

DAVIES & DAVIES

DOUGLAS, OBEAR & CAMPBELL

Of Counsel

APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, Care: Davies
& Davies, Attorneys, Paterson National Bank Building,
Paterson, New Jersey, *Plaintiffs,*

VS.

BOARD OF GOVERNORS OF THE FEDERAL RE-
SERVE SYSTEM, Washington, D. C., *Defendant.*

Appeal from the District Court of the United States for the
District of Columbia.

APPENDIX.

1 Filed Apr. 28, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, Care: Davies
& Davies, Attorneys, Paterson National Bank Building,
Paterson, New Jersey, *Plaintiffs*,

vs.

BOARD OF GOVERNORS OF THE FEDERAL RE-
SERVE SYSTEM, Washington, D. C., *Defendant*.

Complaint

(Petition for Writ of Certiorari)

The plaintiffs, John Agnew and F. O. Fayerweather, respectfully state that they are citizens of the United States and residents of the City of Paterson, State of New Jersey, and bring this action on their own behalf for the reasons hereinafter set forth:

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat., p. 251, known as the "Federal Reserve Act", and certain acts amendatory thereof.

2. Plaintiffs represent that for a number of years past both plaintiffs have been duly elected, qualified and acting directors of The Paterson National Bank of Paterson, New Jersey, the plaintiff, F. O. Fayerweather, having been a
2 director of the said bank since January 13, 1925, and the plaintiff, John Agnew, having been a director of said bank since November 27, 1934. Both plaintiffs were reelected directors at each successive meeting of the shareholders after their original election, including the

shareholders meeting of January 11, 1944, and the shareholders meeting of January 9th, 1945. Following all such elections each took the director's oath prescribed by Section 5147 of the Revised Statutes of the United States as amended. They have performed their duties faithfully and according to law.

3. The Paterson National Bank is a national banking association and a member of the Federal Reserve System. Plaintiffs and their families are owners of a substantial amount of stock in said banking institution, holding approximately 1,000 shares out of a total of 12,000 shares outstanding.

4. On the 23rd day of March, 1945, the defendant, Board of Governors of the Federal Reserve System, removed the plaintiffs as such directors upon the claim of a violation of Section 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), a copy of said order of removal being hereunto annexed and marked Exhibit "A" and is prayed to be taken and read as a part hereof.

Said Section 32 of the Act of 1933 provides as follows:

"Sec. 32. Certain persons excluded from serving as officers, directors or employees of member banks.

No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, *primarily engaged* in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments. (June 16, 1933, c. 89, § 32, 48 Stat. 194; Aug. 23, 1935, c. 614, § 307, 49 Stat. 709.)" (Italics ours)

The claimed authority of the defendant to hear and decide the matter is contained in Section 30 of the aforesaid Banking Act of 1933 (U. S. C. Title 12, Sec. 77) which provides as follows:

"Sec. 77. Removal of director or officer

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such

1

order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a

4 violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than five years, or both, in the discretion of the court. (June 16, 1933, c. 89, § 30, 48 Stat. 193; Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.)

5. On June 29, 1944, the Comptroller of the Currency, pursuant to the provisions of the aforesaid Section 30, certified to the defendant that in his opinion plaintiffs had violated the provisions of the aforesaid Section 32 of the said Act and were continuing so to do after having been warned by him to discontinue such violations, in that, while serving as directors of the aforesaid bank during the years 1942, 1943 and 1944, they were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities. Thereupon on August 9, 1944, the defendant issued an order notifying plaintiffs to appear and show cause why they should not be removed from office as directors of said bank. The defendant Board did not itself hold such hearings, but instead appointed a "hearing officer", although no provision therefor was contained in the Act pursuant to which the Board claimed to act. Thereafter hearings were conducted by such "hearing officer" at the Federal Reserve Bank in New York during the months of October and December, 1944. Plaintiffs appeared at these hearings by counsel and protested upon the ground, among others, that under the language of

Sec. 30 of the Banking Act of 1933, as amended, the Board of Governors of the Federal Reserve System was the only body authorized by law to hold the hearings, and also filed certain other motions, set forth in the record, all of which were overruled by the Board.

5 6. Both plaintiffs were and are employees in the Paterson, New Jersey, office of Eastman Dillon & Co., a partnership, engaged in the brokerage and securities business and having its principal office in the City of New York, N. Y.

Eastman Dillon & Co. acts as broker or as principal in executing orders on the New York Stock Exchange, the Curb Exchange and the Philadelphia Exchange. It buys and sells securities either as broker or principal at wholesale or retail.

In the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution at wholesale or retail or through syndicate participation of stocks, bonds or other similar securities) the market value of securities which were bought and sold by Eastman Dillon & Co. as agent and for its own account over an indefinite period amounted only to about 15% of the total market value.

In total number of transactions during an indefinite period prior to September 20, 1943, those in the "underwriting field" would amount to a similar percentage (15%) of the total number.

Eastman Dillon & Co. does business on a fiscal year basis ending the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" amounted to 26% of its gross income from all sources, while its gross income from brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32% of its income from all sources, while its gross income from its brokerage business amounted to 47% of its income from all sources.

6 7. All of the foregoing averments were found as facts by the defendant Board. Plaintiffs therefore aver that upon the record made there was and is no valid

basis for a charge that Eastman Dillon & Co. was "primarily engaged" in the underwriting of securities business or that plaintiffs have been guilty of the violation of Sec. 32 of the Banking Act.

8. Petitioners are advised by counsel and aver that the said opinion, findings of fact, conclusions of law and order are in disregard of the statutory provisions affecting the matter hereinbefore recited, are contrary to the express provisions of Sec. 32 of the Banking Act of 1933, as amended (U. S. C. Title 12, Sec. 78), are in excess of the jurisdiction of said Board and are in legal effect null and void. True copy of said opinion, findings of fact and conclusions of law, dated the 23rd day of March, 1945, is annexed hereto as Exhibit "B" and is prayed to be taken and read as a part hereof.

9. Petitioners aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey, and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States and that since they have no remedy by appeal or otherwise, they have a right to have said action of said Board of Governors reviewed by this Honorable Court.

Wherefore, The Premises Considered, the plaintiffs pray:

1. That a writ of *certiorari* may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make and issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945, this Court may decree the same to be beyond the

scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. And for such other relief as to the Court may seem meet and proper.

JOHN AGNEW,
F. O. FAYERWEATHER,
Petitioners,
% Davies & Davies,
Paterson National Bank Bldg.,
Paterson, New Jersey.

HUGH H. OBEAR,
Attorney for Petitioners,
822 Southern Building,
Washington, D. C.;
DAVIES & DAVIES,
% Davies & Davies,
Paterson National Bank Building,
Paterson, New Jersey;
DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building,
Washington, D. C.,
Of Counsel.

8 STATE OF NEW JERSEY,
 County of Passaic, ss:

JOHN AGNEW and F. O. FAYERWEATHER, being first duly sworn, on oath depose and say that they have read the foregoing complaint by them subscribed and know the contents thereof; that the matters and things therein stated of their own knowledge are true, and those stated upon information and belief they believe to be true.

JOHN AGNEW,
F. O. FAYERWEATHER.

Subscribed and sworn to before me this 24th day of April, 1945.

ELIZABETH M. HANCOCK,
Notary Public of N. J. (Seal.)

My Commission Expires 12/19/48. Elizabeth M. Hancock.

Filed Apr. 28, 1945

9

EXHIBIT "A"

28726

The Board of Governors of the Federal Reserve System,
Washington, District of Columbia

In the Matter of JOHN AGNEW and F. O. FAYERWEATHER,
Directors, The Paterson National Bank, Paterson, New
Jersey

Order

Preston Delano, Comptroller of the Currency of the United States, being of the opinion that John Agnew and F. O. Fayerweather as directors of The Paterson National Bank, Paterson, New Jersey, have continued to violate section 32 of the Banking Act of 1933, as amended (U. S. C., title 12, sec. 78), a law relating to such national banking association, after having been warned by the Comptroller of the Currency to discontinue such violations; and having, under date of June 29, 1944, certified the facts relating to such violations of law to the Board of Governors of the Federal Reserve System; and the Board having caused due notice to be served upon the said John Agnew and F. O. Fayerweather to appear and show cause why they should not be removed from office as directors of The Paterson National Bank, Paterson, New Jersey; and the said John Agnew and F. O. Fayerweather having appeared in person and by attorney; and the Board having considered all of the motions filed in their behalf, all of the evidence, and all of the argument; and the Board having made its findings of fact and conclusions of law:

It is ordered by the Board that the motions heretofore filed in behalf of the said John Agnew and F. O. Fayerweather be and the same are hereby overruled.

It is further ordered by the Board that the said John Agnew and F. O. Fayerweather and each of them be and, when a copy of this order has been served upon each of them and upon the bank as hereinafter directed, each is thereby

removed from office as a director of The Paterson National Bank, Paterson, New Jersey, and each thereupon shall cease to be a director of said bank.

It is further ordered and directed that the Secretary of this Board cause a copy of this order to be served upon the said John Agnew and upon F. O. Fayerweather and a copy of the same to be served upon The Paterson National Bank, Paterson, New Jersey.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

10 I, Chester Morrill, Secretary of the Board of Governors of the Federal Reserve System, do hereby certify that the foregoing is a true and complete copy of an order of the Board of Governors of the Federal Reserve System, the original of which order is on file among the records of the Board of Governors of the Federal Reserve System.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Board of Governors of the Federal Reserve System to be affixed at the City of Washington on the 23rd day of March, 1945.

(S.) CHESTER MORRILL,
Secretary—Board of Governors. (Seal.)

11 EXHIBIT "B"

Board of Governors of the Federal Reserve System,
Washington

In the Matter of JOHN AGNEW and F. O. FAYERWEATHER,
Directors, The Paterson National Bank, Paterson, New
Jersey

Opinion

This is a proceeding under the applicable provisions of the Banking Act of 1933, as amended, (hereinafter referred to as the Act) to determine whether John Agnew and F. O.

Fayerweather (hereinafter referred to as Respondents) or either of them should be removed from office as directors of The Paterson National Bank, (Hereinafter referred to as the Bank) Paterson, New Jersey. The authority of the Board of Governors of the Federal Reserve System to hear and decide the matter is contained in section 30 of the Act,*

* "Sec. 30. Whenever, in the opinion of the Comptroller of the Currency, any directors or officer of a national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director

which provides *inter alia* that upon a certification by the Comptroller of the Currency that any officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller to discontinue such violations, the Board may cause notice to be served upon such officer or director to appear before it to show cause why he should not be removed from office. The section further provides that if the Board, after granting such officer or director a reasonable opportunity to be heard, finds that he has continued to violate such law after having been warned as aforesaid, the Board in its
 12 discretion may order that such director or officer be removed from office. In this matter, the Board received a certificate from the Comptroller of the Currency under date of June 29, 1944, reciting that the Respondents had continued to violate section 32 of the Act after having been warned by him to discontinue such violations: Section 32 provides as follows:

“Sec. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of

or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than \$5,000, or imprisoned for not more than 5 years, or both, in the discretion of the court.”
 (U. S. Code, title 12, sec. 77)

Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." (U. S. Code, title 12, sec. 78)''

The Comptroller's certificate further recited such additional facts as tended to show, if true, that Respondents while serving as directors of the Bank during the years 1942, 1943 and 1944 were during such time employees of an investment firm primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities.

Accordingly, the Board on August 9, 1944, issued an order notifying Respondents to appear and to show cause why they should not be removed from office as directors of the Bank. A Hearing Officer was appointed by the Board and thereafter hearings were conducted by such Officer at the Federal Reserve Bank of New York during October and December 1944. Respondents were represented in these hearings by counsel and were present at most of the hearings.

Thereafter, on February 15, 1945, the Hearing Officer certified to this Board the transcript of the proceedings conducted before him, together with his recommended findings of fact. He also forwarded certain suggested corrections to the record, exceptions to his tentative findings and certain motions, and a brief, all filed with him on behalf of Respondents.

On March 12, 1945, the Respondents, with their counsel, appeared in person before the Board in Washington, D. C., and their counsel argued the matter orally before the Board.

14 The Board has considered all of the record, as well as the brief and oral arguments made on behalf of the Respondents. The motions filed on behalf of the Respondents will be dealt with in the conclusions of law.

Findings of Fact

There is no dispute as to the essential facts. Respondent Fayerweather has been a director of the Bank since

January 13, 1925, while Respondent Agnew has been a director of the Bank since November 27, 1934. The Bank itself is a national banking association and a member of the Federal Reserve System. Both Respondents were re-elected directors at the annual meetings of the shareholders of the Bank held on January 13, 1942, January 12, 1943, and January 11, 1944. Following these elections, they took the directors' oaths prescribed by section 5147 of the Revised Statutes as amended; and these oaths were duly filed in the office of the Comptroller of the Currency. Total holdings of stock of the Bank by the Respondents and by their families approximate only about 1,000 shares out of a total of 12,000 shares outstanding. Mr. Fayerweather has been in the securities business since 1920 and both he and Mr. Agnew have been employed by the firm of Eastman, Dillon & Co. since March 1941 and are employed at the office of the latter in Paterson, New Jersey.

Eastman, Dillon & Co., a partnership which has its main office in New York, N. Y., advertises and holds itself out to the public as being engaged in the business described in its advertisements as follows:

“Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities”

15- In the 1943 edition of “Security Dealers of North America, published by Herbert D. Siebert & Co., New York, N. Y., the Firm's business is described as follows; and this is an accurate description of the general nature of its business:

“Underwriters, Participating Distributors & Dealers in Municipal & General Market Issues; Stock Brokers.”

The Firm does practically everything in relation to the handling of securities (other than United States Government securities), acting as an agent and acting as a principal, wholesale and retail, executing orders on the Stock Exchange, the Curb Exchange, and the Philadelphia Exchange. Those different activities vary in volume. The Firm endeavors to transact business the way its customers

desire and to transact the type of business its customers desire. Sometimes its customers prefer to do business in stocks and sometimes in bonds. Sometimes they buy or sell in large lots and sometimes in small lots.

The Firm does business on a fiscal year basis. Its year ends on the last day of February. For the fiscal year ending February 28, 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26% of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42% of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32% of its gross income from all sources; and its gross income from the brokerage business amounted to 47% of its gross income from all sources. For the period March 1, 1944 to July 31, 1944, its gross income from the "underwriting field" amounted to 39% of its gross income from all

16 sources; and its gross income from the brokerage business amounted to 40% of its gross income from all sources. However, the figures for the period March 1 to July 31 may not be a fair criterion for a year's business because the Firm's business varies from time to time and sometimes the months of March, April, May and June constitute the more active period of its business. During 1943, the proportion of its business represented by underwriting had been larger than during 1942, due to the decline in the amount of commissions from the brokerage business.

Considering the market value of the securities which were bought and sold by the Firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within "the underwriting field" would represent about 15% of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in "the underwriting field" would amount to a similar percentage (15%) of the total number.

During the year 1943, the Firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to \$14,657,000. For a period during 1943 it ranked first among the underwriters. The Firm gets all the underwriting business that it can.

The Firm does no business with the Bank and has not done so since the Fall of 1941, when the Bank disposed of all of its bonds, other than United States Government bonds. The Firm does not deal in United States Government bonds. Since October 1941, Respondents have done no business with the Bank other than a strictly commission business with its customers.

17 During 1943 the fact of Respondents' dual association with the Bank and with Eastman, Dillon & Co. came to the attention of the Federal Reserve Bank of New York. Thereupon the matter was brought to the attention of the President of the Paterson National Bank. The attention of the latter was directed to the provisions of Section 32 of the Banking Act of 1933, as amended, Regulation R of the Board and the interpretations which had been placed upon the law and regulation by the Board in previous cases. He was further advised that in the opinion of the Federal Reserve Bank of New York Respondents could not lawfully continue as directors of the Bank while associated with Eastman, Dillon & Co.

There followed a lengthy correspondence on this subject until, on May 18, 1944 (Respondents meanwhile having been reelected as directors of the Bank on January 11, 1944), the Comptroller of the Currency, by registered letter sent to each of the Respondents, advised them that in the opinion of the Comptroller of the Currency each was violating section 32 of the Act by serving as a director of the Bank while being at the same time an employee of Eastman, Dillon & Co.; and each was warned by the Comptroller to discontinue such violation of law. Notwithstanding this warning, Respondents continued to serve as directors of the Bank and also continued as employees of Eastman, Dillon & Co.

Conclusions of Law

There are two preliminary matters to be disposed of before turning to the principal issue involved in this proceeding. The first of these is a motion filed on behalf of the Respondents challenging the right of any person or persons to conduct the hearings and to receive evidence on behalf of the Board. Respondents contend that because the statute provides for a notice "to appear before such

Board" all of the evidence must be taken in the
18 Board's presence. It is sufficient to say that this hearing is before the Board and that it is well settled that the requirements of due process do not preclude practical administrative procedure, including the use of examiners or hearing officers to take the evidence to be considered by the authority making the determination. *Morgan v. United States*, 298 U. S. 468, 481; 304 U. S. 1, 21. The significant words of the statute in this connection are those which authorize the Board to act if, "after granting the accused director or officer a reasonable opportunity to be heard," it finds that he has continued to violate the law after warning. We emphasize again that we have considered the record as presented to the Board in its entirety and that our decision is predicated upon such consideration.

In this connection, the "Suggested Corrections to the Record" filed by the Respondents have been considered by the Board, and the Record will be regarded as having been corrected accordingly. Also, the "Exceptions to Tentative Findings of Fact" have been considered, but it appears that both points raised therein were taken care of by the Hearing Officer in preparing his "Recommended Findings".

The second preliminary matter is a motion challenging the sufficiency of the certificate of the Comptroller of the Currency. We do not deem this a substantial objection. The certificate taken as a whole recites facts which, assuming their truth, state a violation of section 32 of the Banking Act of 1933 and a continuation thereof after a warning to discontinue as provided under section 30 of the Act.

These motions and the motion to dismiss addressed to the sufficiency of the evidence are all overruled.

The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of the Comptroller of the Currency, "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities" within the meaning of section 32 of the Act. The Respondents contend that the use of the word "primarily" limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in comparison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word "primary" is frequently used in another sense. For instance, red is one of the "primary" colors but it is not the only primary color; Saturn is one of the "primary" planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as "the primary causes of a war" and "a matter of primary importance". (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary) The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one. The construction for

which the Respondents contend, which is based on one accepted definition of the word "primarily", would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities".

Respondents also argued that since the Bank has no dealings with Eastman, Dillon & Co., the evil at which the law is aimed is not present in this case, and that therefore the Respondents are not prohibited from serving in their dual relationships. The argument ignores the words of the statute, which provides that "no partner or employee" of any firm primarily engaged in underwriting or distributing securities "shall serve at the same time as an officer, director or employee of any member bank". No mention is made of transactions—or the absence of transactions—between the firm and the Bank. As originally enacted, the statute authorized the Board to issue individual permits, but the statute was amended in 1935 so as to revoke this power, and the Board is now authorized to make exceptions only "by general regulations". The Board under this authorization has made only one exception in its regulations on this subject * and that does not apply to the facts of the present case.

* The exception is in the following provision in section 2 of the Board's Regulation R, entitled "Relationships with Dealers in Securities under Section 32 of the Banking Act of 1933":

"Any officer, director, or employee of any corporation or unincorporated association, any partner or employee of any partnership, or any individual, not engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of any stocks, bonds, or other similar securities except bonds,

21 An order that the Respondents be removed from office as directors of The Paterson National Bank, Paterson, New Jersey, will issue.

By direction of the Board of Governors this 23rd day of March, A. D. 1945.

(S.) CHESTER MORRILL,
Secretary.

22

Filed Apr. 28, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, Care: Davies & Davies,
Attorneys, Paterson National Bank Building, Paterson,
New Jersey, *Plaintiffs,*

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D. C., *Defendant*

Motion for Writ of Certiorari

Come now the plaintiffs, by and through their attorneys, and move the Court for a writ of certiorari directed to Board of Governors of the Federal Reserve System, commanding it to send up the complete record and proceedings in the matter of John Agnew and F. O. Fayerweather,

notes, certificates of indebtedness, and Treasury bills of the United States, obligations fully guaranteed both as to principal and interest by the United States, debentures issued by Federal Intermediate Credit banks, bonds issued by Federal Land banks, and general obligations of Territories, dependencies and insular possessions of the United States, may be at the same time an officer, director, or employee of any member bank of the Federal Reserve System, except when otherwise prohibited."

directors The Paterson National Bank, Paterson, New Jersey, to the end that upon consideration of the record and proceedings the order of said Board be held to be in excess of its jurisdiction and null and void.

HUGH H. OBEAR,
Attorney for Plaintiffs,
822 Southern Building,
Washington, D. C.

DAVIES & DAVIES,
Paterson National Bank Building,
Paterson, New Jersey;
DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building,
Washington, D. C.,
Of Counsel.

Served a Copy of the Within Above Motion Notice on within named defendant Board of Governors of Federal Reserve System by serving George B. Vest, General Counsel, personally 4-30-45. C. Michael Kearney, U. S. Marshal in and for the District of Columbia, by T. R. East, Deputy U. S. Marshal. —. U. S. Marshal's Fee, \$2.00.

23

Filed May 4, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, *Plaintiffs,*

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D. C., Care: Edward J. Curran, United
States Attorney for the District of Columbia, Court
House, Washington, D. C., George B. Vest and J. Leonard
Townsend, Board of Governors of the Federal Reserve
System, Washington, D. C., *Defendant*

Motion to Dismiss

Comes now the Board of Governors of the Federal Reserve System by its attorneys undersigned and moves this Honorable Court to dismiss the complaint herein on the following grounds:

1. This Court is without jurisdiction to entertain a suit against the Board of Governors of the Federal Reserve System, which is an instrumentality of the United States and which has not consented nor can it consent to be sued herein.

2. This Court is without jurisdiction to issue a writ of certiorari for the purpose outlined in the bill of complaint herein.

24 3. The complaint fails to state any claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the Dis-
trict of Columbia,
Court House,
Washington, D. C.;
 GEORGE B. VEST,
 J. LEONARD TOWNSEND,
Board of Governors of the Federal
Reserve System,
Washington, D. C.,
Counsel for Defendant.

Service of the within motion acknowledged.
 HUGH H. OBEAR,
 822 Southern Building,
 Washington, D. C.,
Counsel for Plaintiffs.

* * * * *

27

Filed May 15, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, Care: Davies & Davies
Attorneys, Paterson National Bank Building, Paterson,
New Jersey, *Plaintiffs*, vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D. C.; MARRINER S. ECCLES, RONALD RANSOM,
M. S. SZYMCAK, JOHN K. MCKEE, ERNEST G. DRAPER,
RUDOLPH M. EVANS, *Defendants*

*Amended Complaint for Writ of Certiorari or, in
Alternative, for an Injunction*

1. The defendant, Board of Governors of the Federal Reserve System, is an administrative and quasi-judicial tribunal, having its principal office in the City of Washington, District of Columbia, and is organized under and by virtue of the Act of December 23, 1913, Ch. 6, 38 Stat. p. 251, known as the "Federal Reserve Act", and certain acts amendatory thereof. The defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, are members of the Board of Governors of the Federal Reserve System.

2-8. Plaintiffs adopt the allegations of paragraphs 2 to 8, inclusive, of the original complaint filed herein.

9. Plaintiffs aver that they were and are prejudiced by the said order of the said Board of Governors entered the 23rd day of March, 1945, wherein and whereby they were removed from their said offices as directors of the Paterson National Bank of Paterson, New Jersey and deprived of the same and of the emoluments thereof, all without due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States.

10. Plaintiffs aver that the actions of the defendant Board of Governors hereinabove referred to have been participated in by the individual defendants as members of such

Board of Governors, and that such actions on the part of the individual defendants were wholly without right or authority in law and in excess of their power and authority as members of the defendant Board of Governors.

11. Plaintiffs are in doubt as to whether their remedy for the aforesaid grievances is by way of writ of certiorari to the defendant Board of Governors or by way of mandatory injunction against the said Board or the individual members thereof.

Wherefore, the Premises Considered, plaintiffs pray:

1. That a writ of certiorari may be awarded them directed to the Board of Governors of the Federal Reserve System commanding it to certify to this Honorable Court the complete record and proceedings in the matter hereinbefore recited to the end that this Court may review the same and consider and determine whether the said Board of Governors had jurisdiction and authority to make and issue the aforesaid order dated the 23rd day of March, 1945, and that upon such consideration of the record and proceedings and order, dated the 23rd day of March, 1945, this Court may decree the same to be beyond the scope and power of the said Board of Governors and in excess of its jurisdiction, and null and void.

2. That in the alternative, this Court may enter a mandatory injunction against the defendant Board of Governors and the individual defendants herein named, commanding said defendants and each of them to vacate and set aside their purported order entered on the 23rd day of March, 1945, and hereinabove referred to.

3. That plaintiffs may have such other, further and alternative relief as to the court may seem meet and proper.

HUGH H. OBEAR,
822 Southern Building,
Washington, D. C.,
Attorney for Plaintiff.

DAVIES & DAVIES,
Paterson National Bank Building,
Paterson, New Jersey;

DOUGLAS, OBEAR & CAMPBELL,
822 Southern Building,
Washington, D. C.,
Of Counsel.

30

Filed Jun. 9, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, *Plaintiffs,*

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D. C.; MARRINER S. ECCLES, RONALD RANSOM,
M. S. SZYMCAK, JOHN K. MCKEE, ERNEST G. DRAPER,
RUDOLPH M. EVANS, *Defendants*

Motion of the Individual Defendants to Dismiss

Come now the defendants, Marriner S. Eccles, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, by their attorneys undersigned and move this Honorable Court to dismiss the amended complaint herein on the following grounds:

1. The Court lacks jurisdiction over the subject matter of this suit because the suit is in effect one seeking to interfere with and control the Board of Governors of the Federal Reserve System, an agency of the United States, in the performance of its lawful duties under the laws of the United States; such suit, therefore, is a suit against the United States which is not and cannot be made a party hereto.

31 2. The amended complaint otherwise fails to state a claim upon which any relief can be granted.

EDWARD M. CURRAN,
United States Attorney for the Dis-
trict of Columbia,
Court House,
Washington, D. C.;

GEORGE B. VEST,
J. LEONARD TOWNSEND,
*Board of Governors of the Federal
Reserve System,
Washington, D. C.,
Counsel for Defendants.*

Service of the within motion acknowledged.
HUGH H. OBEAR,
822 Southern Building,
Washington, D. C.,
Counsel for Plaintiffs.

32

Filed Jun. 25, 1945

In the District Court of the United States
For the District of Columbia

Civil Action

No. 28726

JOHN AGNEW, F. O. FAYERWEATHER, *Plaintiffs,*

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D. C.; MARRINER S. ECCLES, RONALD RANSOM,
M. S. SZYMCAK, JOHN K. MCKEE, ERNEST G. DRAPER,
RUDOLPH M. EVANS, *Defendants*

Judgment

The above-entitled matter came on to be heard by the Court upon the complaint, the amended complaint, and motions to dismiss filed by the defendant, Board of Governors of the Federal Reserve System, and the individual defendants, respectively. Upon consideration of the oral argument had upon said motions and the briefs filed herein by the parties, it is by the Court this 25th day of June, 1945,

Adjudged, Ordered and Decreed, That the complaint and the amended complaint be and the same are hereby dismissed.

MATTHEW F. McGUIRE,
Justice.

Approved as to form.
HUGH H. OBEAR,
Counsel for Plaintiffs.

* * * * *

(725)

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9102

JOHN AGNEW, F. O. FAYERWEATHER, *Appellants,*

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN K. McKEE, ERNEST G. DRAPER, AND RUDOLPH M. EVANS, *APPELLEES.*

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

EDWARD M. CURRAN,
*United States Attorney for
the District of Columbia,*

GEORGE B. VEST,
J. LEONARD TOWNSEND,
*Board of Governors of the
Federal Reserve System,
Counsel for Appellees.*

FILED NOV - 3 1945

Joseph M. Stamps

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9102

JOHN AGNEW, F. O. FAYERWEATHER, *Appellants*,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, WASHINGTON, D. C.; MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCAK, JOHN K. McKEE, ERNEST G. DRAPER, AND RUDOLPH M. EVANS, APPELLEES.

Appeal from the District Court of the United States for the District of Columbia.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This case comes before the court on appeal from an order entered below dismissing appellants' original and amended complaints. The sole question presented is whether such complaints, read together, state any appropriate claim for relief.

The facts are briefly stated. On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing appel-

lants as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank). The order was issued pursuant to authority conferred upon the Board by section 30 of the Banking Act of 1933 (48 Stat. 193) U. S. C. Title 12, §77,¹ which provides, *inter alia*, that if, following a hearing, the Board finds that an officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such violation, the Board in its discretion may order that such officer or director be removed from office. The finding upon which the Board's order in this case was made was that appellants had continued to violate section 32 of the Banking Act of 1933, (48 Stat. 194) U. S. C. Title 12, §78,² after having been warned by the Comptroller of the Currency to discontinue such violation. Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

Appellants make no claim of fraud or of any lack of procedural due process before either the Comptroller or the Board. They charge simply that the facts upon which the Board concluded that their employer is "primarily engaged" in the "underwriting" business do not, as a matter of law, sustain such a conclusion. In other words, appellants charge that the Board made a mistake in interpreting the statute and that this alleged mistake nullifies the Board's order.

The basis of appellants' claim is that, because appellants' employer engages in other business than that of a strictly "underwriting" nature, such employer can only be said to be "primarily engaged" in the underwriting business if it is demonstrated that the latter is *first* in volume and *first* from the standpoint of profits of the employer's business. The Board found (and it is not contradicted) that appel-

¹ Set out in full in appellants' brief, pp. 7-8.

² Set out in full in appellants' brief, p. 9.

lants' employer, Eastman, Dillon & Co., is engaged in the general brokerage and securities business with its principal place of business in the City of New York; that it acts as broker or principal in executing orders on the New York Stock Exchange, the New York Curb Exchange and the Philadelphia Exchange; that it buys and sells securities as broker or principal at wholesale or retail; that over an indefinite period the transactions of the firm in the "underwriting" field amounted to about 15 per cent of the total market value of the securities that were bought and sold by the firm during the same period; that the total number of its underwriting transactions during the same period approximated a similar percentage (15%) of the total number of the firm's transactions; that for the fiscal year ending February 28, 1943, 26 per cent of the firm's gross income was derived from its underwriting business, while 42 per cent of its gross income was derived from its brokerage business; that for the year ending February 29, 1944, 32 per cent of the firm's gross income was derived from its underwriting business, while 47 per cent of its gross income was derived from its brokerage business; that during 1943 the firm ranked ninth among 94 leading investment companies of the country with respect to its participations in bond underwritings; that for a period during such year it ranked first among such underwriters, excluding participations in municipal and railroad financings; and that the firm's participations in underwritings during 1943 amounted to \$14,657,000. (Appellants' App. 10, et seq.)

Appellants' original complaint named only the Board as defendant. It prayed that a writ of certiorari be issued directing the Board to certify its record to the court for the purpose of determining whether the Board "had jurisdiction and authority to make and issue" its order removing appellants as directors of the Bank. (Appellants' App. 2, et seq.) The amended complaint added the individual members of the Board as parties defendant to the action and it contained prayers for relief in the alternative—asking either for the issuance of a writ of certiorari to the Board for

the purposes set out above or for a mandatory injunction against the Board and the individual defendants "commanding said defendants and each of them to vacate and set aside their purported order." (Appellants' App. 23-24.) Motions were made below to dismiss both the complaint and the amended complaint. (Appellants' App. 22, 25.) These motions raised generally the question of the jurisdiction of the court over the subject matter and challenged the sufficiency of the averments of the complaints as setting forth grounds for relief in any form. The motions were granted without opinion. (Appellants' App. 26-27.)

SUMMARY OF ARGUMENT.

Appellees will show:

(1) That the District Courts are without jurisdiction to entertain a suit against the Board, as such, because the Board is an administrative agency of the United States, suable only with the consent of Congress, and such consent has not been given, either expressly or impliedly;

(2) That the suit against the individuals must fail because they, as members of the Board, had the statutory authority and duty to interpret the statute, hence appellants are in error in asserting that the individual appellees exceeded their statutory authority. Appellants' real claim is that, in construing the statute, appellees committed an error of law; but such a situation, under the decision of the Supreme Court in *Adams vs. Nagle*, 303 U. S. 532, 82 L. Ed. 999 (1938) is not reviewable in the courts except on a charge of fraud, not present here;

(3) That the District Courts are without jurisdiction to issue the writ of certiorari to review the decisions of an administrative agency of the Government; and

(4) That the Board's interpretation of the words "primarily engaged" as used in the statute is not only a literal and dictionary interpretation, but it is the only one which gives effect to the true Congressional intent.

ARGUMENT.

Appellants' brief pays little or no attention to the question of *parties*, but proceeds on the apparent assumption that, because they disagree with a legal conclusion of the Board, they are entitled as a matter of absolute right to have such conclusion reviewed by the courts and therefore it is up to the court to find a remedy for that purpose. Appellees, however, must and do concern themselves with the question of parties, for considerations vital to the effective administration of the Federal banking laws are involved. As we shall demonstrate, there are fatal jurisdictional defects which lie at the threshold of appellants' claim, but their explanation requires that we discuss the case first as a suit against the Board itself, and secondly as one against the individual members of the Board.

I.

Viewed as a suit against the Board appellants' suit must fail because it is in effect a suit against the United States which has not consented to be sued herein.

It is, of course, axiomatic that a sovereign may not be sued in its own courts without its consent. "This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some Act of Congress." *The Siren*, 7 Wall. 152, 154, 20 L. Ed. 505 (1869). Nor can a complainant against the United States alter this fundamental proposition by an artful selection of the remedy sought, for a "sovereign's immunity from suit exists whatever the character of the proceedings or the source of the right sought to be enforced." *Lynch vs. United States*, 292 U. S. 571, 582, 78 L. Ed. 1434 (1934). Under these principles, then, our inquiry is limited to the simple question: Is a suit against the Board in legal effect a suit against the

United States and, if so, has Congress consented to the bringing of such a suit?

There is no need to waste the time of the Court to demonstrate that the Board is an administrative agency of the United States and, as such, is an integral part of our National Government. Appellants make no argument to the contrary and, by amending their complaint to seek relief against the individuals who comprise the Board, seem to have admitted this fact. We think it sufficient, therefore, merely to summarize a few of the considerations which demonstrate the point. They are:

(1) The statute under which the Board was created vests in it a wide administrative authority in regulating and supervising the Federal Reserve Banks, as well as the member banks of the Federal Reserve System and certain phases of the affairs of national banks; (38 Stat. 251) U. S. C. Title 12, §221, et seq.

(2) The Attorney General has ruled that the Board is an "independent board or Government establishment" and that it is "a distinctly administrative board with extensive powers"; *30 Op. Atty. Gen. 308*.

(3) The District Government has determined that the property of the Board is "property of the United States" and hence exempt from taxation; *Exemption File 5120*, Assessor's Office, D. C.

(4) This is the first time since its creation that the Board, as such, has been sued in the courts of its official habitat, which is evidence of a conceded want of power to sue or be sued; *Degge v. Hitchcock*, 229 U. S. 162, 169-170, 57 L. Ed. 1135 (1913).

(5) When on the two occasions attempts were made to join the Board as defendant in other jurisdictions, the Board was dismissed from the actions. In one case, in dismissing the complaint as to the Board, the court said: "Neither in the enactment creating the Board nor in any subsequent act has the Congress given its consent to suits against the Board". *Peoples Bank v. Federal Reserve Bank of San Francisco, et al.*, 58 F. Supp. 25 (D. C. Cal. 1944), App. dismissed 149 F. (2d) 850 (C. C. A. 9th, 1945); *Pascagoula National Bank v. Federal Reserve Bank of At-*

lanta, et al. (D. C. N. D. Ga. 1924, unreported). See also: *Cohn v. United States Shipping Board, et al.*, 20 F. (2d) 56 (1927); *North Dakota-Montana Wheat Growers' Ass'n v. United States*, 66 F. (2d) 573 (cert. den. 291 U. S. 672, 1934).

The above resume could be extended, but in view of appellants' apparent concession of the point we think it suffices to establish the basic proposition that a suit against the Board is in legal effect a suit against the United States. As, in the absence of a waiver of immunity by Congress, the Board is entitled to the same immunity from suit as is the United States, it remains to consider whether Congress has authorized the bringing of the present suit against the Board. Admittedly, there is no specific statutory provision for such a suit, and the question therefore resolves itself into this: Does the statute contain any implied grant of a right of judicial review of the Board's findings and order respecting appellants?

It has long since authoritatively been settled that a right of judicial review is not a prerequisite to the constitutional validity of statutes creating regulatory bodies, even though the determinations of such bodies may sometimes involve the application of legal principles and may result in the taking of property. Thus, in *Crane v. Hahlo*, 258 U. S. 142, 148, 66 L. Ed. 514 (1922), the Supreme Court held that legislators might, in proceedings for the taking of property, act on "the policy that the greater good is sometimes secured by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him."

In reviewing a number of the cases involving this general proposition Justice Brandeis, in his concurring opinion in the case of *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 80 L. Ed. 1033 (1936), stated as follows (p. 81):

“These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on *ex parte* casual inspection of unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision.”

One of the most recent expressions by the Supreme Court on this subject is to be found in the case of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 88 L. Ed. 61 (1943). In that case the Supreme Court concluded that the District Court was without jurisdiction to review a decision of the Mediation Board, determining that a certain union had been designated and authorized to represent the employees of two railroads, notwithstanding the fact that such determination required the carrier to deal only with the union certified by the Board. During the course of its opinion the court made the following statements which are applicable here:

“Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. *Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied.* See *United States v. Griffin*, 303 U. S. 226, 232-237. (p. 301)

* * *

“The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co. v. United States*, 277 U. S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana v. McAdoo*, 234 U. S. 627, 633; *United States v. George S. Bush & Co.*, 310 U. S. 371; *Work v. Rives*, 267 U. S. 175; *United States v. Babcock*, *supra.*” (p. 303) (Italics ours)

With these general principles to guide us, let us now examine the statute here involved. In doing so it is important to bear in mind that, in making its order in this case, the Board was fulfilling a function not only incidental to its broad supervisory powers over the Federal Reserve System, but was also acting in a complementary fashion in the administration of the national banking laws, for the prohibitions of section 32 of the Banking Act of 1933 are part of a comprehensive scheme of statutory control over national banks. It is also important to bear in mind that the national bank is itself a creature of the national legislature and that Congress, in authorizing the formation of such banks, may do so upon such terms and conditions as it deems fit. National banks are “instrumentalities of the federal government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States.” *Smith v. Witherow*, 102 F. (2d) 638, 641 (C. C. A. 3rd, 1939) (citing *Davis v. Elmira Savings Bank*, 161 U. S. 275, 40 L. Ed. 700). “Their business is so intimately connected with the public interest that Congress may prohibit it altogether or prescribe the conditions under which it may be carried on.” *Id.*

Even a cursory examination of the Federal banking laws will demonstrate the *exclusive* character of the powers which Congress vested in those to whom it delegated the task of supervising the affairs of national banks. From

the first stages of incorporation to the last stages of receivership liquidations, national banks are subject to a wide variety of *discretionary* controls by such authorities. As stated by the Supreme Court in *Deitrick v. Greaney*, 309 U. S. 190, 194, 84 L. Ed. 694, the National Banking Act constitutes "by itself a complete system for the establishment and government of national banks". (Citing *Cook County National Bank v. United States*, 107 U. S. 445, 27 L. Ed. 537)

To consider only a few of the discretionary powers of the principal administrative agent in charge of national banks, the Comptroller of the Currency: He is to determine whether an association formed under the Act may commence business,¹ and his decisions on whether to issue a certificate are conclusive, *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168 (1876), *Bushnell v. Leland*, 164 U. S. 684, 41 L. Ed. 598 (1897); consolidations or conversions affecting national banks may only be had with his "approval";² branch banks may only be opened with his "approval";³ changes in the capital structure of a national bank may only be made subject to his "approval";⁴ he is authorized to "approve" certain exceptions to the making of loans in excess of statutory amounts;⁵ and he may by regulation permit national banks to act as insurance agents or brokers.⁶

Let us emphasize once again that all of the powers above enumerated are exercised by the Comptroller under statutes which make no provision for any right of review of the Comptroller's action. And of particular importance and analogy to the instant case is the power, vested exclu-

¹ R. S. § § 5168, 5169, U. S. C. Title 12, § § 26, 27.

² 40 Stat. 1043, U. S. C. Title 12, § 33; 44 Stat. 1225, U. S. C. Title 12, § 34a; 38 Stat. 258, U. S. C. Title 12, § 35.

³ R. S. § 5155, U. S. C. Title 12, § 36.

⁴ 48 Stat. 5, U. S. C. Title 12, § 51a; 48 Stat. 5, U. S. C. Title 12, 51b; R. S. § 5142, U. S. C. Title 12, § 57, 24 Stat. 18, U. S. C. Title 12, § 58; 38 Stat. 274, U. S. C. Title 12, § 59.

⁵ 34 Stat. 451, U. S. C. Title 12, § 84.

⁶ 39 Stat. 753, U. S. C. Title 12, § 92.

sively in the Comptroller, to appoint receivers for national banks and to make assessments against stockholders of national banks under the double liability provisions of the law.¹ In exercising these powers the Comptroller makes decisions involving matters of traditional judicial cognizance, including the construction of the national banking laws, when insolvency exists, and the like. Such decisions directly and substantially affect property rights conforming to definite judicial standards. *Yet the courts are uniform in holding that the decisions of the Comptroller on these matters are conclusive in the absence of a showing of positive fraud.* Thus, in *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476 (1869), which involved a suit against stockholders to collect assessments made by the Comptroller, the court said (p. 505):

“The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him.”

A more recent case, and one which we think is controlling here, is that of *Adams v. Nagle*, 303 U. S. 532, 82 L. Ed. 999 (1938). In that case stockholders of certain national banks brought a bill in equity to enjoin the receiver from enforcing assessments ordered by the Comptroller on the ground that the action of the Comptroller in ordering such assessments was in excess of his statutory power, arbitrary, capricious and a denial of due process of law. In determining that the Federal courts were without jurisdiction

¹ R. S. § 5151, U. S. C. Title 12, § 63; 19 Stat. 63, U. S. C. Title 12, § 191.

to grant relief on the allegations of the complaint in that case, the court made the following statement, which is directly applicable here:

“4. The question remains whether, if the Comptroller’s action arose from mistake of fact or law, the remedy here invoked is appropriate. In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent. of the par value of the stock against the shareholders to pay creditors’ claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. *The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation.* It would be intolerable if the Comptroller’s decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done. It would be equally intolerable if stockholders as a class could call upon a court to review the Comptroller’s exercise of his discretion. *For a court to entertain a suit for this purpose would be to render nugatory the functions Congress has confided in the Comptroller. It has often been decided this may not be done*” (p. 540) (Italics ours)

See also *United States Savings Bank v. Morganthau*, 66 App. D. C. 234, 85 F. (2d) 811 (1936); *Liberty National Bank v. McIntosh*, 16 F. (2d) 906, 909 (C. C. A. 4th, 1927), and cases there cited.

It is clear from the decisions just discussed that the underlying reason for the refusal of the courts to assume jurisdiction to review decisions of the Comptroller in the cases presented is the potential harm to the public generally which might result from the delays which judicial review would entail. “The convenience of large numbers of the public perhaps affected by what is to be done, and

the serious disturbance of business conditions liable to be involved, would seem to justify and warrant this grant of power to an official of the dignity and importance of the Comptroller of the Currency." *Liberty National Bank v. McIntosh, supra.*

The ratio decedendi of these decisions applies with even greater force to the instant case, we submit, for here there is not only the possibility that *delay* in removing a national bank director might operate to the detriment of the bank and its depositors and customers, *but a public examination into the reason for such removal might have instant and far more serious consequences.* The next removal proceeding before the Board, instead of being predicated upon a violation of section 32, might be based upon a charge that the director or directors "have continued unsafe or unsound practices in conducting the business of such bank", another reason for which the Board under this statute may remove officers and directors of national or member banks. The implications of such a charge are alone sufficient, if publicized, to disturb public confidence in the bank; the publicity incident to giving the ex-director his "day in court" would only serve to emphasize the charge and perhaps even to bring ruin to the institution. Indeed, Congress apparently recognized this fact, for it wrote a positive prohibition into the law (which, incidentally, these appellants have violated in their complaint) that the Board's order of removal under section 30, *together with the findings of fact upon which it is based*, "shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section." (Appellants' Br. 8)

In concluding this portion of our brief, therefore, counsel respectfully submit that, for the reasons discussed above, the District Courts lack jurisdiction to entertain a suit against the Board to review its order and findings under section 30 of the Banking Act of 1933.

II.

Viewed as a suit against individuals, appellants' suit must fail because the record shows that appellees were acting within their lawful authority as members of the Board in interpreting the words "primarily engaged" as used in the statute.

When appellants amended their complaint by adding the individual members of the Board as parties defendant to the action they did so in the obvious hope that it would bring their case within the admitted jurisdiction of a court, in an appropriate case, to restrain a public officer from committing a purely private wrong in taking action beyond his statutory authority.

The answer to appellants' contention in this respect is simple. In the first place, adding the individual defendants plainly was a maneuver designed to accomplish indirectly that which, for reasons fully set out above, appellants may not do directly. If the reasons urged above are sufficient to deny a right of review of the reasons for the Board's order in a suit against the Board itself, they apply with equal force, we submit, to *any* public examination into the matter no matter who are the nominal parties to the proceeding.

A more important and fundamental answer, however, is that appellants are clearly wrong in attempting to bring their claim within the admitted jurisdiction of the District Court to grant injunctive relief against public officers in certain types of cases. They cite the familiar cases of *Philadelphia v. Stimson*,¹ *Goltra v. Weeks*,² *Ickes v. Fox*,³ and others equally familiar, and these citations confirm our contention in this respect. In the cases just mentioned, as well as in the general class of cases which they represent, the theory upon which relief is afforded is that the public officer, although claiming to act under statutory authority,

¹ 223 U. S. 605; 56 L. Ed. 570.

² 271 U. S. 536, 70 L. Ed. 1074.

³ 66 App. D. C. 128, 85 F. (2d) 294.

in reality is acting in excess of his real authority for one or more reasons, and hence can be enjoined on purely equitable principles. Appellants reason that, because they challenge the Board's interpretation of the statute here involved, this is a challenge of the *authority* of the individual members to decide the matter and that, therefore, the case fits the principle just announced.

But appellants' argument stops when it should begin, because the Board's authority extends to its interpretation of the statute; hence, appellees did act within their specific statutory authority when they construed the words "primarily engaged." We think appellants will freely admit, and in any event it is perfectly clear from their brief, that their real claim is that, in construing the statute in the manner complained of, appellees were led to their conclusion as a result of some error of fact or law. Such a contention, not accompanied by a charge of bad faith, is not available to them, however, because it was disposed of specifically by the Supreme Court in *Adams v. Nagle*, supra, wherein the court, in a proceeding for injunctive relief based upon the same theory as appellants now urge, said as follows: (p. 541)

"Relying on this expression a number of the federal courts have said that, while an assessment may not be collaterally attacked, it may be avoided by direct attack for 'clear error of law, fraud, or mistake.' Respondents admit this statement is too broad. Other courts have said that the only ground of successful attack is fraud on the part of the Comptroller. This case presents no such basis for relief. The bills do not charge bad faith or fraud on the part of the Comptroller. The averment that his ruling with respect to the contract of February 17 and the consequent action of the receiver were 'in fraud' of the rights of Penn and Reading and their stockholders falls far short of any charge of actual fraud. Indeed no suggestion of such fraud was advanced by respondents either in brief or in argument.

"The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate

of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. *Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority.*

“The respondents further insist that their allegation that the Comptroller’s action was ‘arbitrary,’ which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet ‘arbitrary,’ used in this connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, ‘committed grave error of law’ in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.” (Italics ours)

The same principle was announced by this Court in *Brunswick v. Elliott*, 70 App. D. C. 45, 103 F. (2d) 746 (1939). That case involved a suit to enjoin the Acting Comptroller General from interfering in any way in the payment to plaintiff of an annuity provided for under an Act of Congress. In the course of its opinion this Court said: (pp. 750, 751)

“Under the circumstances, therefore, it was the duty of the Comptroller to render a decision, which in turn was required to be based upon an interpretation of statutes, the construction and application of which were not ‘free from doubt and equivalent to a positive command.’ This duty was not ministerial but was instead administrative and quasi-judicial in character, requiring for its proper performance the exercise of judgment and discretion. Consequently its exercise cannot be controlled by writ of mandamus, or injunction. ‘To hold otherwise would render orderly administrative procedure impossible.’ Thus, if the writ were granted in the present case we would in effect require the Comptroller General ‘to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make.’ This we cannot do.”

Again in *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451 (C.C.A. 4th, 1933) we find another clear-cut expression of the principle. In this case a suit was brought against the individual members of the Federal Power Commission to enjoin them from interfering with the proposed construction of a power dam and to require them to expunge from the records of the Power Commission certain orders relating to this project. In the course of its opinion the court made the following statement: (p. 456)

“The finding that the interests of interstate or foreign commerce would be affected by the structure was made, of course, upon evidence not apparent on the face of the order; *but any contention that this finding is not supported by the evidence calls for a review of the exercise of the power of the commission and does not challenge the existence of the power itself.* And there can be no question but that the United States would be a necessary party to any suit brought to set aside an order of the commission because not supported by evidence; for such a suit would be one affecting the action of the commission in its official capacity and would be in

effect a suit against the United States. *Morrison v. Work*, 266 U. S. 481, 488, 45 S. Ct. 149, 69 L. Ed. 394; *Naganab v. Hitchcock*, 202 U. S. 473, 26 S. Ct. 667, 50 L. Ed. 1113; *Oregon v. Hitchcock*, 202 U. S. 60, 68, 26 S. Ct. 568, 50 L. Ed. 935." (Italics ours)

These cases are more than sufficient, we submit, to demonstrate the fundamental error in appellants' position. While the individual members of the Board are sued in their personal capacities, it is perfectly clear that appellants' real grievance is against them in their collective capacity as the Board and that any remedy which might be granted would directly affect the Board. Consequently, as in the case last cited, any remedy which the Court might allow would operate against the United States, which is not and cannot be made a party hereto.

III.

The District Courts are without jurisdiction to issue the writ of certiorari for the purposes here sought.

The jurisdictional points just discussed are, if well taken, decisive of appellants' case in its entirety and we respectfully ask the Court so to decide. Should the Court determine, however, that appellants are entitled to judicial review of the Board's findings and order, then there is a further jurisdictional point we wish to urge. It is that the remedy of certiorari is not available for that purpose.

It should be noted at the outset that not once have the United States courts undertaken to issue the writ of certiorari to an administrative agency of the Government. Occasionally, as here, requests have been made for its issuance and generally under circumstances akin to those here alleged. But in no case, so far as counsel have been able to locate, has the remedy been granted. Fortunately there is no need for an extended search of the cases which deal with the general subject for the Supreme Court in a case precisely in point has clearly and explicitly stated why it is not available in cases such as is here presented. Counsel for

appellants have cited this case in support of their claim but, as the Court will shortly see, instead of aiding appellants, the case actually disposes of their claim.

The case is that of *Degge v. Hitchcock*, 229 U. S. 162, 57 L. Ed. 1135 (1913), and it arose in this jurisdiction. It was commenced in the then Supreme Court of the District of Columbia. The petition alleged that, following a hearing before the Post Office Department on charges that they were conducting a scheme to defraud through the use of the mails, an order was issued by the Postmaster General depriving plaintiffs of their mailing privileges. The petition prayed that a writ of certiorari issue directing the Postmaster General to certify the record before him to the court. On the return of a rule to show cause why the writ should not issue, the Postmaster General included an extended description of plaintiff's activities which led to the order revoking their mailing privileges. On this state of the record the lower court discharged the rule and dismissed the petition, and an appeal was taken to this Court.

The judgment of the lower court was affirmed (35 App. D. C. 218), this Court indicating a doubt as to the jurisdiction of the lower court to issue the writ for the purposes disclosed by the record, but concluding that in any event the facts did not warrant its exercise.

The case was then appealed to the Supreme Court and there the matter was decided squarely and solely on the jurisdictional point, the court ruling against the jurisdiction of the lower court to issue the writ under the circumstances presented by the bill. After pointing out that the case was the first one "in which a Federal court had been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States Government," the court stated as follows: (p. 170)

"That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of departments that directly affected

personal and property rights and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of *quasi-judicial* orders under attack.”

The court then went on to review the scope of the common law writ of certiorari, following which it decided the case as follows: (p. 171)

“It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order and that in making his ruling he may be said to have acted in a *quasi-judicial* capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. *Philadelphia Co. v. Stimson*, 233 U. S. 605, 620.

“ * * * To hold that the writ could issue either before or after an administrative ruling would make the dispatch of business in the Departments wait on the decisions of the courts and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the Executive by the Judicial branch of the Government.”

We submit that the case at bar is foursquare with that of *Degge v. Hitchcock*. Here, too, the Board “gave notice and a hearing to the persons specially to be affected by the order and . . . in making [its] order . . . may be said to have

acted in a *quasi-judicial* capacity." Here, too, the statute under which the Board acted "was passed primarily for the benefit of the public at large and the order was for them and their protection." Consequently here, too, "that fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari." We submit that the *Degge v. Hitchcock* case is absolutely determinative of this jurisdictional question.

Even in the face of this opinion, however, there have been sporadic attempts since to get the courts in this jurisdiction to issue the writ in analogous situations; but to no avail. In each case this Court, basing its decision on the principles announced by the Supreme Court in *Degge v. Hitchcock*, rejected the contention that the writ was available to review an administrative determination of an agency of the United States Government. These cases are: *Mickadiet v. Payne*, 50 App. D. C. 115, 269 Fed. 194 (1920), (aff'd, 258 U. S. 609); *Detroit & T. S. L. R. Co. v. Interstate Commerce Commission*, 51 App. D. C. 133, 277 Fed. 535 (1921); *Donner Steel Co. v. Interstate Commerce Commission*, 52 App. D. C. 221, 285 Fed. 955 (1923); *Delaware & Hudson R. Corp. v. Interstate Commerce Commission*, 60 App. D. C. 267, 51 F. (2d) 429 (1931); and *Southern Transport Co. v. Interstate Commerce Commission*, 61 App. D. C. 284, 61 F. (2d) 925 (1932).

In view of this uninterrupted chain of cases in this jurisdiction—all plainly against the contentions of appellants herein—we respectfully ask this Court to declare that the lower court is without jurisdiction to issue the writ of certiorari under the circumstances disclosed by this case.

Even if we were to concede, however, that certiorari might lie to review administrative orders of the kind here involved, it is clear nevertheless that the writ should not issue in this case. This is so because the complaint shows on its face that the Board *had jurisdiction* to issue the order in question, and the authorities are as one in holding that the scope of review by certiorari is limited solely to de-

termining whether the tribunal to which the writ is directed had jurisdiction to enter the order; *it does not extend to an appraisal of the correctness of such determination*. This proposition, of course, is based upon the long-settled principle that the extraordinary legal remedies such as mandamus, prohibition and certiorari cannot be made to serve the purpose of appeal. There is an early and oft-cited case in the Supreme Court on this question which is conclusive on this point. The case is that of *Harris v. Barber*, 129 U. S. 366, 32 L. Ed. 697 (1889), in which the court was reviewing a judgment quashing a writ of certiorari to a justice of the peace. The court said: (p. 371)

“As was well said by Mr. Justice Merrick in delivering the opinion of the court below, ‘These averments constitute fully a statement of the relation of landlord and tenant between the parties. Now whether the proof came up to these averments or not cannot be inquired into upon a writ of *certiorari*. *Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction.’”

And the same proposition has been stated a number of times by this Court. Thus, in *Detroit & T. S. L. R. Co. v. Interstate Commerce Commission*, *supra*, the court, after stating that the writ of certiorari would not lie to review an order of an administrative officer, stated as follows: (p. 537)

“Appellant recognizes the soundness of this rule, but seeks to escape its effect by endeavoring to show that the Commission acted outside of its jurisdiction. The Commission was charged with the duty of ascertaining the operating income of the company. In performing that duty it was necessary for it to determine what items should be included in the income and what should not be. It therefore was acting within its jurisdiction when it decided that the item of \$164,800 should be treated as the company had treated it on its books, namely, as a deduction.”

To the same effect, see: *Degge v. Hitchcock*, supra; *Southern Transport Co. v. Interstate Commerce Commission*, supra; and *Delaware & Hudson R. Corp. v. Interstate Commerce Commission*, supra.

IV.

The Board correctly interpreted the words "primarily engaged" as used in the statute.

This brings us to our final argument, which goes to the merits of appellants' claim. It raises the question of whether, assuming that the lower court had jurisdiction of the subject matter of the complaint, the facts alleged show that appellants were entitled to relief in any form.

As we have seen, Congress prohibited any individual who is employed by a firm "primarily engaged" in the underwriting business from simultaneously serving as an officer or director of a national bank. Appellants contend that, because the evidence before the Board showed that the underwriting business of their employer amounted to but 15 per cent of the face amount of its gross business, and because only 26 per cent in one year, and 32 per cent in another, of its gross income was derived from such underwriting business, the Board's determination that Eastman, Dillon & Co. is "primarily engaged" in the underwriting business is unjustified. In other words, appellants' contention, predicated upon a purely quantitative concept of the meaning of the words "primarily engaged" as used in the statute, is that only if the underwriting business of their employer is the largest in volume of its total business and produces the largest percentage of its total profits can it be said that the firm is "primarily engaged" in the underwriting business—and this despite the fact that the firm ranks among the leading underwriters of the country and in one year alone did an underwriting business of almost fifteen million dollars.

Quite apart from the application of any principles of statutory construction, the very statement of appellants'

argument should be its own refutation. Consider the absurd consequences which would flow from the application of any such quantitative test. Company A, which might rank *ninetieth* on the list of leading underwriters, but engaged *exclusively* in the underwriting business, does an average total volume, let us say, of \$500,000 per year. Such a company, which meets even appellants' quantitative test, undoubtedly is "primarily engaged" in the underwriting business within the meaning of the statute. Consequently, an employee of Company A would be prohibited from serving as a director of a national bank. But Company B, ranking *ninth* on such a list, and doing an average of \$15,000,000 annually in underwriting business, would not be "primarily engaged" in the underwriting business if the company also does \$90,000,000 (or even \$16,000,000) total volume in its brokerage accounts. Consequently, according to appellants' theory, employees of Company B would not be prohibited from also serving as directors of national banks.

The other facet of appellants' argument, which suggests that a comparison be made between the gross profits of the various departments of a company in determining whether it is "primarily engaged" in the underwriting business, would lead to equally absurd results. Suppose a company having a total annual *brokerage* business of \$25,000,000 realized a gross profit on this business of \$3,000,000. Let us say in any one year that the same company participated in underwritings to the extent of \$25,000,000, but that its gross profits on such business was only \$2,000,000. Under appellants' theory, such a company would not be "primarily engaged" in the underwriting business because its gross profits on the latter were less than its gross profits on its brokerage accounts. And to carry the appellants' argument to its ultimate absurdity, if in the case just cited the total business and profits of the company were equally divided between its brokerage and underwriting departments, then such a company would not be "primarily engaged" in any business!

Can it be that Congress intended to hazard the accomplishment of one of the most important objectives of the Banking Act of 1933 upon so variable a test as the total amount of business or profits in any one year of a given company, where a difference of only one per cent in such totals might be sufficient to decide the issue one way or the other? Or is it more reasonable to suppose that Congress intended to lay down a more practical and less changeable test for the guidance of the administrative agency which it charged with eliminating the evils to which the Act was addressed? Appellants urge the former test as the correct one and point to the words "primarily engaged" as requiring such a conclusion. We take the latter view and can justify our position without either ignoring or doing interpretative violence to the words upon which appellants so heavily rely.

Before discussing the different shades of meaning which may properly be ascribed to these words, however, let us fix clearly in mind the exact setting into which Congress placed them. The Court will no doubt take judicial notice of the great depression which began with the stock market crash in 1929 and continued throughout the early and middle thirties. As we all know, a part of that depression took the form of numerous bank failures, and we have a vivid recollection of the Bank Holiday of March 1933. Faced with such a national crisis the Congress in 1932 began its consideration of measures designed to strike at the heart of evils theretofore existing in the banking business generally. Extensive Congressional hearings were held in 1932 and in 1933, and these resulted in the passage of the Banking Act of 1933. While one of the purposes of this legislation was to guarantee future bank deposits up to a certain amount through a system of governmental insurance, another and vitally important objective was to eradicate so far as possible those conditions which had contributed substantially to the 1929-1933 debacle. As we shall see, one of the principal evils against which the law

was aimed was the securities affiliate situation, which had grown to demonstrably dangerous proportions in only a comparatively short space of time.

The report of the Senate Committee on Banking and Currency (Senate Report No. 77, 73rd Congress) on the bill which ultimately became the Banking Act of 1933 is particularly pertinent in disclosing the purpose of the framers of the bill. That portion of the Report which refers to securities affiliates of banks reads in part as follows:

“Condition of Member Banks

“The outstanding development in the commercial banking system during the prepanic period was the appearance of excessive security loans, and of overinvestment in securities of all kinds. The effects of this situation in changing the whole character of the banking problem can hardly be overemphasized. National banks were never intended to undertake investment banking business on a large scale, and the whole tenor of legislation and administrative rulings concerning them has been away from recognition of such a growth in the direction of investment banking as legitimate. Nevertheless it has continued; and a very fruitful cause of bank failures, especially within the past three years, has been the fact that the funds of various institutions have been so extensively ‘tied up’ in long-term investments. The growth of the investment portfolio of the bank itself has been greatly emphasized in importance by the organization of allied or affiliated companies under State laws, through which even more extensive advances and investments in the security market could be made. * * *

* * *

“2. *Banking affiliates.*—There seems to be no doubt anywhere that a large factor in the overdevelopment of security loans, and in the dangerous use of the resources of bank depositors for the purpose of making speculative profits and incurring the danger of hazardous losses, has been furnished by perversions of the national banking and State banking laws, and that, as

a result, machinery has been created which tends toward danger in several directions.

“(a) The greatest of such dangers is seen in the growth of ‘bank affiliates’ which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks’ own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the situation. It has been suggested from many quarters that the affiliate system be simply, ‘abolished.’ This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

“(1) To separate as far as possible national and member banks from affiliates of all kinds.

“(2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.

“(3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks.”¹

With these considerations in mind Congress wrote into the bill various sections intended to accomplish the objectives set out in Senate Report No. 77, *supra*, including

¹ Senator Bulkley, who with Senator Glass had taken a leading part in the deliberations of the Committee, made the following statement on the floor of the Senate:

“Obviously, the banker who has nothing to sell to his depositors is much better qualified to advise disinterestedly and to regard diligently the safety of depositors than the banker who uses the list of depositors in his savings department to distribute circulars concerning the advantages of this, that, or the other investment on which the bank is to receive an originating profit or an underwriting profit or a distribution profit or a trading profit or any combination of such profits.” (Cong. Rec. Vol. 75, Part 9, p. 9912)

those designed "to separate as far as possible national and member banks from affiliates of all kinds." One of the principal sections designed to attain these purposes is section 20 of the Act¹, which provides that no member bank shall be affiliated "in any manner" with any company "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities". Section 21² is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging "at the same time to any extent whatever in the business of receiving deposits . . . "

Notwithstanding the provisions contained in sections 20 and 21 just referred to, there was, of course, always the danger that, despite formal divorcement of banks from their securities affiliates, the underlying evils of such affiliations might be perpetuated if close relationships between member banks and dealers in securities were permitted to continue, either through interlocking directorates or by other means. Section 32, therefore, was included and obviously was intended to prevent such relationships from developing, at least to the extent that they then could be anticipated. Consequently, in construing the provisions of section 32, it is necessary to bear in mind the positive Congressional intent to make this section an integral part of a comprehensive plan not only to eliminate existing evils, but also to prevent their future recurrence in any form.

With this legislative history and obvious Congressional purpose to guide us, let us examine the situation here presented. Appellants are employed by a firm which admittedly engages in substantial underwriting activities—in fact, it is one of the leading underwriting firms in the country. As a result, the potential evil which Congress visualized when it passed the Banking Act of 1933 would be present if they

¹ 48 Stat. 188, U. S. C. Title 12, § 377.

² 48 Stat. 189, U. S. C. Title 12, § 378.

were permitted to remain as directors of The Paterson National Bank, for they *might* attempt to use their position as bank directors to further their private interests in the underwriting business, to the detriment of the bank and its depositors.¹ Therefore, the situation here is precisely of a nature which Congress intended to prohibit, and it remains only to determine if the language of the Act, fairly interpreted, brings appellants within its proscriptions.

It is true that, under one of its dictionary definitions, the word "primarily" has a quantitative meaning. This, however, is not the only accepted meaning; it is also defined as "fundamentally" (Webster's Collegiate Dictionary, Fifth Edition). The word "primary" is also frequently used in another sense. As pointed out in the Board's opinion, red is one of the "primary" colors but there are other primary colors; Saturn is one of the "primary" planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as "the primary causes of war" and "a matter of primary importance" (Merriam Webster's International Dictionary, Second Edition and Webster's Collegiate Dictionary, Fifth Edition). Undoubtedly, then, Eastman, Dillon & Co. are "fundamentally" or "primarily" engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the businesses in which the firm is "primarily" engaged.

Appellants attempt, by devoting a considerable portion of their brief to a discussion of criminal cases, to convince the Court that the statute here involved is penal in nature and that the rule of strict statutory construction should apply. The answer to this contention is twofold.

In the first place, this is not a criminal case, nor is there even a suggestion in the record that appellants are in danger of criminal action. Certainly nothing that happened

¹ No showing was made in the hearing before the Board nor is it claimed that appellants have ever taken advantage of their position as directors in this manner. Obviously, however, the statute is wholly preventive in character and hence no such showing is necessary.

before the Board places them in any such danger. And nothing in section 32 makes it a crime for a director of a national bank to be employed by an underwriting firm; that section prohibits, but nothing more. In short, the proceeding before the Board was wholly administrative in its nature, having for its objective an ultimate official determination as to whether the Board should in the public interest exercise its admitted discretion to remove appellants as directors of the bank. Under such circumstances, we submit, the proceeding before the Board was similar to that which occurs every day before numerous regulatory agencies of the Government which administer such remedial statutes as the Securities Act of 1933, the National Labor Relations Act, the Fair Labor Standards Act and others of a similar nature. They are essentially and basically administrative in their character.

In the second place, even if the prohibitions of section 32 were penal in their nature, appellants can take little comfort from the so-called rule of strict construction. "No rule requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—*nor does any rule require that the Act be given the narrowest meaning.* It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." (Italics ours) *United States v. Raynor*, 302 U. S. 540, 82 L. Ed. 413 (1938). As we have seen, the Board's construction of the statute is in accordance with even the literal meaning of the words "primarily engaged" and, more to the point, that construction brings within the proscriptions of the law situations which Congress clearly intended to prohibit. It follows, therefore, even if this were a criminal proceeding, that the Board's construction of the statute should remain undisturbed.

Finally, appellants seek to inject a constitutional issue into the case by arguing that, unless their construction of the words "primarily engaged" be the only correct interpretation of those words, the statute itself is unconstitu-

tional as containing an unlawful delegation of legislative power. This contention is so obviously untenable as scarcely to require an answer. It is enough to repeat that the Board's interpretation of the statute was both authorized and correct. It did not extend the language used by Congress to bring unintended results, nor did Congress use language incapable of precise application in individual cases to achieve its desired objectives. Under these circumstances there can be no question of unlawful delegation; at most the problem is one of statutory construction and this we have already fully discussed.

We submit, on the basis of all the discussion above appearing, that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWARD M. CURRAN,
*United States Attorney for
the District of Columbia,*

GEORGE B. VEST,
J. LEONARD TOWNSEND,
*Board of Governors of the
Federal Reserve System,
Counsel for Appellees.*